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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 87.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Petitioner,

v.

LULA CARROLL, Administratrix of the Estate of GUERNEY O. BURTCH, Deceased,
Respondent.

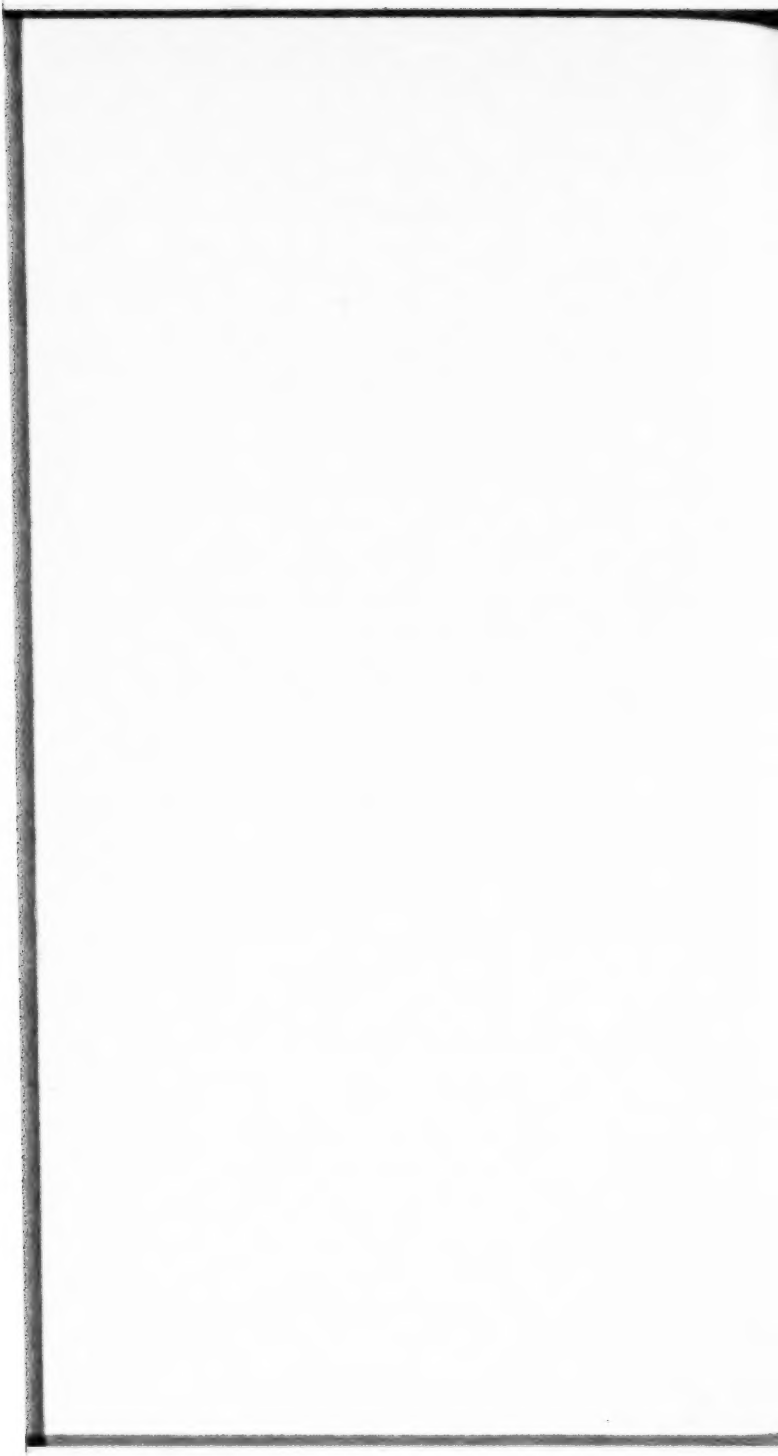
On Writ of Certiorari to the Supreme Court of Indiana.

BRIEF OF RESPONDENT.

OSCAR H. MONTGOMERY,
T. HARLAN MONTGOMERY,
Attorneys for Respondent.

WILLIAM J. HUGHES,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477



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Respondent.

On Writ of Certiorari to the Supreme Court of Indiana.

BRIEF OF RESPONDENT.

STATEMENT OF RELEVANT FACTS.

Guerney O. Burtch was injured by the negligence of petitioner October 24, 1917 (R. 163). His injuries were incurable and fatal (R. 126 and 138).

February 20, 1918, Guerney O. Burtch brought an action in the Jackson Circuit Court for damages resulting from his injuries (R. 1).

The complaint in this action was in two paragraphs, the first of which was based on the Indiana Employers' Liability Act of 1911, Section 1 of which, being Section 9432, Burns' Statutes 1926, reads as follows:

> "Any person, firm or corporation while engaged in business, trade or commerce within this state, and employing in such business, trade or commerce five or more persons, shall be liable and respond in damages to any person suffering injury while in the employ of such person, firm or corporation, or in case of the death of such employe, then to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and if none, then to such employe's parents, and if none, then to the next of kin dependent upon such employe, where such injury or death resulted in whole or in part from the negligence of such employer or his, its or their agents, servants, employes or officers, or by reason of any defect, mismanagement or insufficiency, due to his, its or their carelessness, negligence, fault or omission of duty."

Section 4 of this act, being Section 9435, Burns' Statutes 1926, reads as follows:

> "The damages recoverable under this act shall be commensurate with the injuries sustained, and, in case death results from such injury, the action shall

survive: Provided, that where any such injured person recovers a judgment under the provisions of this act, and an appeal is taken from such judgment, and pending such appeal, the injured person dies and said judgment be thereafter reversed; or where such injured person dies after said judgment is reversed and before trial, the right of action of such person shall survive to his or her personal representative, and such action may be continued in the name of such personal representative for the benefit of the person entitled under this act to receive the same."

The second paragraph of this complaint was based on a common-law liability for negligence, as shown in the former opinion of this Court. Section 293, Burns' Statutes 1926, providing for the survival of a claim for personal injuries, applicable to this paragraph of complaint, reads as follows:

"Whoever has a claim for personal injuries and obtains judgment for the same against any person, company or corporation in any trial court of this state, and from which judgment any person, company or corporation against whom or which the same was obtained, shall appeal to the Supreme or Appellate Court of this state, and such judgment be reversed by such Supreme or Appellate Court, and a new trial be granted to appellant thereon; and if the person who obtained such judgment should die pending such appeal, or before a new trial after such reversal can be had, such claim for personal injuries shall survive and may be prosecuted by the representative of such dece-

dent as other claims are prosecuted for and on behalf of decedents' estates."

A trial was had on this complaint in the Jackson Circuit Court on May 27 and 28, 1918, and a verdict of $8,000.00 returned for plaintiff (R. 13 and 14).

October 23, 1918, a new trial was denied and judgment rendered on the verdict and an appeal to the Supreme Court of Indiana taken (R. 29 and 30).

March 14, 1922, this judgment was affirmed by the Supreme Court of Indiana (R. 33) (Baltimore etc. Ry. Co. v. Burtch, 192 Ind. 199).

This cause was transferred from the Indiana Supreme Court to the Supreme Court of the United States and reversed and remanded (Baltimore etc. R. Co. v. Burtch, 263 U. S. 540).

February 29, 1924, the Supreme Court of Indiana, in pursuance of the mandate of the Supreme Court of the United States, reversed the judgment and remanded the cause to the Jackson Circuit Court (R. 34).

February 10, 1921, while the appeal in this cause was pending, Guerney O. Burtch died as a result of his injuries, and his widow, Lula Burtch, was by the Jennings Circuit Court appointed and qualified as administratrix of his estate (R. 231, 232). By order of the Court Lula Burtch, as administratrix, was substituted for Guerney O. Burtch, as respondent in the case. December 25, 1923, Lula Burtch was married to a Mr. Carroll (R. 235).

March 5, 1924, immediately after the return of the cause to the Jackson Circuit Court and the granting of a new trial in pursuance of the mandate of the Supreme Court, Lula Carroll, as administratrix of the estate of Guerney O. Burtch, deceased, with leave of Court, filed an amended complaint in three paragraphs (R. 34). The first and second paragraphs of the amended complaint were substantially the same as in the original complaint, with the allegation of additional facts showing the death of the plaintiff, Guerney O. Burtch, pending the appeal, and the survival of the cause of action stated in the first paragraph, and the survival of the claim for personal injuries alleged in the second paragraph. The third paragraph of the amended complaint averred the same acts of negligence as those stated in the other paragraphs, with the additional allegation that plaintiff and defendant were engaged in interstate commerce at the time the injuries were suffered, and also averred the death of Guerney O. Burtch as the result of his injuries, and asks damages not only for personal injuries suffered by him, but also damages resulting from his wrongful death (R. 34 to 44).

Petitioner, for second paragraph of answer, alleged that the cause of action did not accrue within two years, and for third paragraph of answer alleged that so much of plaintiff's cause of action as was based on said death did not accrue within two years next before the commencement of the action (R. 56, 57). These answers were denied (R. 58).

This cause, on change of venue, was sent to the Jennings Circuit Court and there tried by jury March 16 to 19, 1925 (R. 69, 76, 96). The Court, in writing, instructed the jury to disregard the first paragraph of complaint, in the light of the evidence (R. 99, 91).

A verdict of $15,000.00 in favor of plaintiff was returned (R. 102), and judgment thereon rendered March 21, 1925 (R. 112).

A new trial was denied June 1, 1925, and an appeal to the Supreme Court of Indiana taken (R. 118).

The Supreme Court of Indiana affirmed this judgment October 2, 1928 (R. 276). The opinion of that Court affirming the judgment appears in the record at pages 277 to 287.

This Court granted petitioner's application for a writ of certiorari, with this limitation: "That counsel shall confine themselves in the briefs and in all arguments to the question whether this suit is barred by the Statute of Limitations."

POINTS AND AUTHORITIES.

I.

Third Paragraph of Amended Complaint.

(a) The original complaint, in two paragraphs, was timely filed, and, under the law of Indiana, the forum in which this cause was tried, the filing of respondent's third paragraph of amended complaint, founded on the same transaction as that mentioned in the original complaint, but declaring on the Federal Employers' Liability Act instead of the Indiana Employers' Liability Act, did not introduce a new cause of action, and the paragraph so filed was not barred by the two years limitation.

Chicago etc. Ry. Co. v. Dinius, 180 Ind. 596;
Oolitic Stone Company v. Ridge, 174 Ind. 558;
Terre Haute etc. Ry. Co. v. Zehner, 166 Ind. 149;
Cleveland etc. Ry. Co. v. Bergschicker, 162 Ind. 108.

(b) This Court also has expressly held that an amendment to a complaint by a railroad employe asking damages for personal injuries, by alleging that the parties were engaged in interstate commerce, does not introduce a new cause of action, and hence may be made, although the limitation period has expired.

New York etc. R. Co. v. Kinney, 260 U. S. 340;
St. Louis etc. R. Co. v. Smith, 243 U. S. 630;
Missouri etc. R. Co. v. Wulf, 226 U. S. 570;

Smith v. Atlantic etc. R. Co., 210 Fed. 761, 127 C. C. A. 311;
De Valle Da Costa v. Southern Pac. R. Co., 176 Fed. 843, 100 C. C. A. 313, 217 U. S. 606.

(c) This is the uniform holding of the courts of last resort in a number of the states.

Alabama etc. Co. v. Heald, 154 Ala. 580;
Wilson v. Denver etc. R. Co., ... Col. ..., 187 Pac. 1027;
Gainsville etc. R. Co. v. Vandiver, 141 Ga. 350;
Bashan v. Chicago etc. R. Co., 178 Ga. 998;
Cincinnati etc. R. Co. v. Goode, 163 Ky. 60;
Lanis v. Illinois etc. R. Co., 140 La. 1;
Jorgensen v. Grand Rapids etc. R. Co., 189 Mich. 537;
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Fort Worth Belt R. Co. v. Jones, ... Tex. Civ. App. ..., 182 S. W. 1184;
Curtice v. Chicago etc. R. Co., 162 Wis. 421, 166 Wis. 594, 247 U. S. 510.

II.

Second Paragraph of Amended Complaint.

The Statute of Limitations has no application to the second paragraph of amended complaint, since it was timely filed, and seeks a recovery not for death, but only upon a claim for personal injuries suffered by Guerney O. Burtch, and reduced to judgment in his lifetime, and

caused to survive his death by virtue of Section 293, Burns' Statutes 1926, without regard to the cause of his death.

Section 293, Burns' Statutes 1926;
Cincinnati etc. R. Co. v. McCullom, 183 Ind. 556;
Harmon v. Brown, 183 Ind. 535;
Murray v. Omaha Transfer Co., 95 Neb. 175, 98 Neb. 482.

III.

One Cause of Action Stated in Third Paragraph of Amended Complaint.

(1) The liability created by Section 1 of the Federal Employers' Liability Act is for both injury and death resulting from certain specified negligence. This liability is readily distinguishable from that given for death by statutes patterned after Lord Campbell's Act. Such statutes merely modify the common law to the extent that an action is given to specified beneficiaries for a death which is the result of any wrongful act. The federal act creates a right of action, which did not exist before, for injuries resulting in whole or in part from certain specified negligence and authorizes a recovery of damages resulting both from personal injuries and death.

U. S. Code 1928, Title 45, Section 51.

(2) The Federal Employers' Liability Act is exclusive in its field, and, by amendment, was intended to grant all the relief afforded by the statutes of any of the states under

like circumstances. Death and survival acts, in a number of states, authorized recovery of damages resulting to an injured employe, and also resulting to his widow and children from his death because of the negligent or wrongful act of his employer.

Larue v. C. G. Kershaw Constr. Co., 177 Ala. 441;
Kling v. Torello, 87 Conn. 301;
Bartley v. Boston etc. Ry. Co., 198 Mass. 163;
Mobile etc. R. Co. v. Hicks, 91 Miss. 273;
Davidson Benedict Co. v. Swerson, 109 Tenn. 572.

(3) The amendment of April 5, 1910, provides that "any right" or the entire right of action, so given, not for personal injuries only, nor for death only, but for both, shall survive; but, that there shall be only one recovery.

U. S. Code 1928, Title 45, Section 59.

(4) The cause of action in this case is not barred, since suit was timely brought; but the effect of the amendment to the federal statute is to permit and require all damages, both to decedent in his lifetime, by reason of the injury, and to his widow and children, by reason of his death, to be merged upon his death and to be recovered in one action for the benefit of his widow and children.

St. Louis etc. R. Co. v. Craft, 237 U. S. 648;
Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144;
Kansas City etc. R. Co. v. Leslie, 238 U. S. 599;

Moffett v. Baltimore etc. R. Co., 220 Fed. 39, 135 C. C. A. 607;
Northern Pac. R. Co. v. Maerkl, 198 Fed. 263, 117 C. C. A. 237;
Illinois C. R. Co. v. O'Neill, 177 Fed. 328, 100 C. C. A. 658, 217 U. S. 604.

(5) The decision of this Court in the case of St. Louis etc. R. Co. v. Craft, supra, awarding damages both for personal injuries and death in the same action, under the amended Federal Employers' Act, has become the law of the land and has been followed in the following cases:

Birmingham etc. R. Co. v. Hendrix, ... Ala. ..., 110 So. 312;
St. Louis etc. R. Co. v. Conarty, 106 Ark. 421;
Baltimore etc. R. Co. v. Carroll, 200 Ind. ..., 163 N. E. 99;
Jorgensen v. Grand Rapids etc. R. Co., 189 Mich. 537, 543;
Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144;
Brooks v. Yazoo etc. R. Co., 111 Miss. 793;
Kilburn v. Chicago M. & St. P. R. Co., 289 Mo. 75;
Chicago R. I. & P. R. Co. v. Fontron, 89 Okla. 87;
Atchison etc. R. Co. v. Hix, ... Tex. Civ. App. ..., 291 S. W. 281;
Calhoun v. Great Northern R. Co., 162 Wis. 264;
Goodyear v. Davis, 114 Kans. 557, 39 A. L. R. 563;
Thornhill v. Davis, 121 S. C. 49, 24 A. L. R. 617;
St. Louis etc. Ry. Co. v. Pearson, 170 Ark. 842, certiorari denied.

ARGUMENT.

Guerney O. Burtch, on October 24, 1917, suffered injuries for which this action was brought. The action was commenced February 20, 1918. It is urged that because of the amendment of the complaint, after two years from the date of injury, the cause of action is barred. This contention is not tenable under any applicable law. In the case of Chicago etc. R. Co. v. Dinius, 180 Ind. 596, 616, the Court said:

> "As a final objection to the complaint it is alleged that the complaint is an amended complaint filed more than two years after the accident, that it introduces a new cause of action and a different one from that stated in the original complaint, upon which the cause was first tried. This being true, it is contended the complaint showed on its face that the cause of action set up was barred by the two years Statute of Limitations, and was, therefore, subject to demurrer for want of facts. The objection is without merit and wholly unsustained by our decisions * * *. The case before us clearly comes within the rule that where an amendment to a complaint sets up no new matter or claim, but merely amplifies and restates with more certainty, or in a different form, the cause of action set out in the original pleading, it relates back to the commencement of the suit, and the Statute of Limitations is arrested at that point."

The case of Oolitic Stone Company v. Ridge, 174 Ind. 558, was originally based on the Indiana Employers' Lia-

bility Act, and after a judgment for the plaintiff and an appeal, and reversal of the judgment, and after the lapse of more than two years, the complaint was so amended as to seek a recovery for negligence at common law. It was urged that the cause of action stated in the amended compaint was barred, but the Court denied this contention, saying:

> "Both the former and the present complaint involve the same transaction and injury. The gravamen of the action, as disclosed by both complaints, is the personal injury sustained by appellee, due to the fact that he was, by appellant, ordered outside of his employment to work in an unsafe and dangerous place, without any warning with respect to that fact, and by reason thereof suffered the injuries of which he complains * * *. The amendment cannot be said to have deprived the appellant of any defense which he had as against the action stated in the original complaint. The same evidence would support both the original and the amended complaint. For the reasons herein stated the amended complaint must be held to relate back to the time when the action was originally commenced; hence there is no room for interposing the Statute of Limitation in bar of this suit."

These cases make clear the right to amend the complaint, as was done in this case, under the law of Indiana, without subjecting the pleading to the bar of the Statute of Limitations.

In the case of Moffett v. Baltimore etc. R. Co., 220 Fed. 39, a railroad employe was killed on December 27, 1910,

and the complaint was amended in a material matter on January 28, 1913, and the right so to do was not even questioned.

In the case of Smith v. Atlantic Coast Line R. Co., 210 Fed. 761, the official syllabus reads as follows:

> "Where the complaint in an action by an employe for a personal injury, commenced within two years after the injury occurred, alleged the facts and stated a cause of action of which the Court had jurisdiction, an amendment, made after the expiration of such two years, alleging that defendant was engaged in interstate commerce, and that plaintiff was employed in such commerce at the time of his injuries, so as to bring the case within Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), does not introduce a new cause of action, but only affects the defenses which may be made, and the action is not barred by the two years limitation contained in section 6 of the act."

In the case of Missouri etc. R. Co. v. Wulf, 226 U. S. 570, 576, this Court said in reference to amendment:

> "Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years limitation prescribed by Section 6 of the Employers' Liability Act. The change was in form rather than in substance (Stewart v. Baltimore & Ohio Railroad Co., 168 U. S. 445). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and, therefore, it related back to the beginning of the suit."

The case of New York etc. R. Co. v. Kinney, 260 U. S. 340, conclusively settles the right of the respondent to make the amendment of which complaint is made in this case. That case had been tried three times, and seven and one-half years had run since it was commenced, when an amendment was made bringing it within the federal act, and upon that point this Court pertinently said:

> "Where a complaint in an action for personal injuries alleges facts which may constitute the wrong either under the state law or the Federal Employers' Liability Act, according to the nature of the employment, an amendment alleging that the parties at the time of the injury were engaged in interstate commerce does not introduce a new cause of action, and may be allowed after the two-year limitation prescribed by section 6 of the act has run."

And the Court, by Mr. Justice Holmes, further said:

> "When the defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specific conduct, the reasons for the Statute of Limitations do not exist and we are of opinion that a liberal rule should be applied."

These decisions conclusively settle the right of the respondent in this case to be substituted as plaintiff, and to make the amendments shown, and that no part of the action declared upon is barred by the Statute of Limitations.

The principle so declared is no new or strange doctrine, but is in accord with the holdings of the highest courts in many of the states, as shown by citations under point I (c) of this brief.

No contention is made by the petitioner, or could be plausibly made, that the cause of action set up in the second paragraph of amended complaint is barred. The claim for damages because of personal injuries sustained by Guerney O. Burtch is the same in the amended complaint as in the original complaint. The only change made is the allegation of additional facts, showing the death of Burtch after a judgment in his favor, and pending an appeal therefrom, so as to bring the case within the survival provisions of Section 293, Burns' Statutes 1926. In the case of Cincinnati etc. R. Co. v. McCullom, 183 Ind. 556, 569, this statute was held to be constitutional and its purpose and meaning construed as follows:

> "The latter statute provides for the survival of the cause of action which existed in the deceased person prior to his death. The action which the personal representative is permitted to prosecute is not one created by statute for the exclusive benefit of those who suffer loss by death, but is a cause of action which comes to the representative by survival, and the recovery, if any, inures to the benefit of the estate. The cause of action is based upon the wrong inflicted upon the person of the decedent, and the amount of recovery is measured from the standpoint of the decedent and not from that of any fixed beneficiaries."

In so far as the judgment in this case rests, if at all, upon this paragraph of complaint, it should be affirmed without question.

The real conflict in this case is waged against so much of the third paragraph of amended complaint as seeks a recovery of damages resulting from the death of Guerney O. Burtch. Mr. Burtch lived three years after he was hurt, and his death, as a result of his injuries, occurred three years before the amended complaint was filed. A separate action for his wrongful death, if allowable, would have been barred at the time of his decease. The action for personal injuries brought by him was pending on appeal in the Supreme Court of Indiana, and in this court, for three years after his death, so that the complaint could not have been amended or supplemented during that time. The complaint was so amended as to show his death at the earliest opportunity afforded. It follows that if a recovery for his death, as an element of damages, cannot be had under this amended complaint, then the law by its own processes has defeated its manifest ends and purposes and denied full justice. We do not believe that the law is subject to such reproach.

In the case of American R. Co. v. Didricksen, 227 U. S. 145, this Court held that under the Federal Employers' Liability Act, before the amendment of 1910, a cause of action created in favor of the injured employe would not survive his death, or pass to his representatives; but, that the act, in case of the death of such an employe from his

injury, created a new a distinct right of action for the benefit of the dependent relatives named in the statutes. The amendment was manifestly designed to remedy this injustice.

The State of Connecticut had a survival statute in force prior to the amendment of 1910 to the Federal Employers' Liability Act, and the Supreme Court of Errors of that state, in the case of Kling v. Torello, 87 Conn. 301, held that a recovery could be had both for the damages suffered by the employe in his lifetime and also for the damages resulting from his death on account of the injury sustained. We quote from the Connecticut case the following:

> "The situation is very different in this state. The right of recovery for the death which our statute gives is not one which is independent of or unrelated to the right of action which was in the deceased at his death. Our statute is framed upon an entirely different theory and effectuates quite a different policy (Goodsell v. Hartford & N. H. R. Co., supra). The right of action which the executor or administrator is permitted to pursue is not one which springs from the death. It is one which comes to the representative by survival. The right of recovery for the death is as for one of the consequences of the wrong inflicted upon the decedent. The amount of recovery is determined from the standpoint of the deceased, and not from that of the statutory beneficiaries. Its measure, within the statutory limitation, is the value of life to him whose life has been cut off (Broughel v. Southern New England Teleph. Co., 73 Conn. 614, 620, 84 Am. St. Rep. 176, 48 Atl. 751). When one, as the result of injuries inflicted, suffers during life, and death later results,

there are not two independent rights of action. There is but one liability, and that is for all the consequences of the wrongful act, including the death (Broughel v. Southern New England Teleph. Co., 73 Conn. 614, 617, 84 Am. St. Rep. 176, 48 Atl. 751). There cannot be two recoveries (Goodsell v. Hartford & N. H. R. Co., supra; McElligott v. Randolph, 61 Conn. 157, 159, 29 Am. St. Rep. 181, 22 Atl. 1094). If the injured man survives to recover he recovers once for all; if he dies before recovery his executor or administrator stands in his place. The survival statute operates to transfer to the representative the right of action which the deceased had for his sufferings and disability during life, while the death enlarges his right of recovery by permitting an award of additional damages for the death itself as one of the harmful results of the wrongful act. The Court is, by the statute, as it was not by the common law, authorized to take that event into consideration, as it might any other physical development consequent upon the injuries, whether occurring before or after action brought. The new event is not regarded as one which creates a cause of action, but one which has a bearing upon the award of damages. Instantaneous death may of itself bring into existence a right of action which is confined, in the matter of recovery, to the event of death (Murphy v. New York & N. H. R. Co., 30 Conn. 184, 188). But if the death is not instantaneous the right of action is not so confined. It reaches back to the antecedent harmful results, and the death is, by force of the statute, made one of the incidents, in the story of results, which is material in a determination of the amount of recovery to which the representative is entitled (Broughel v. Southern New England Teleph. Co., supra)."

The Supreme Court of Tennessee in the case of Davidson Benedict Co. v. Swerson, 109 Tenn. 572, 614, announced a like holding from which we quote as follows:

> "It is apparent from the authorities that there are, under the sections of the Code referred to, and the Act of 1803, two classes of damages recoverable in the same action: First, damages purely for the injury to the deceased himself; second, the incidental damages suffered by his widow and children, or next of kin, from his death."

In the case of Dougherty v. New Orleans R. & Light Co., 133 La. 993, the Court held, under a survival statute of that state, that on the death of the injured person his right of action to recover damages for personal injuries survived for the benefit of the beneficiaries designated, and a right of action accrued in favor of the beneficiaries designated, to recover compensation for the pecuniary injuries sustained by them for the death.

In the case of Larue v. C. G. Kershaw Contracting Co., 177 Ala. 441, the Supreme Court of that state, construing the provisions of the Tennessee Code, held that those statutes create no new and independent cause of action, but merely continue a cause of action which accrued to the injured person, so that it does not abate by his death, but survives to his widow, children or personal representative; and that the cause of action was not the death of the person injured, but the breach of duty that caused the injury, and, if death results, this is but an aggravation of the injury.

It is a familiar principle of law that when doubt arises as to the proper construction of a statute, and the purpose and intent of the Legislature or Congress, courts will look to contemporaneous history for the evils sought to be remedied, and the conditions that probably led up to and induced the enactment.

This Court recognized and, in substance, declared that principle in the case of St. Louis etc. R. Co. v. Craft, 237 U. S. 648, in connection with the interpretation of the amendment to the Federal Employers' Liability Act, wherein it is said:

> "The original act, as we have said, made no provision for the survival of the right of action given to the injured person, although such a provision existed in the statutes of many of the states. Shortly after the act two cases arose thereunder, in each of which the personal representative of an injured employe, who died from his injuries, sought to recover damages for the employe's personal loss and suffering while he lived, as well as for the pecuniary loss to the beneficiaries named in the act. In both cases—one in the Circuit Court for the Western District of Arkansas and the other in the Circuit Court for the District of Massachusetts—the right of the injured employe would have survived if the local statutes were applicable, and the ruling in both was that the Federal Act was exclusive and superseded the local statutes, that it made no provision for a survival, and, therefore, that the recovery should be confined to damages for the pecuniary loss resulting to the designated beneficiaries from the death (Fulgham v. Midland Valley R. Co.,

167 Fed. 660; Walsh v. New York, N. H. & H. R. Co., 173 Fed. 494). Following these decisions the amendment embodying the new section was proposed in Congress. In reporting upon it the Committees on the Judiciary in the Senate and House of Representatives referred at length to the opinions delivered in the two cases, to the absence from the original act of a provision for a survival of the employe's right of action, and to the presence of such a provision in the statutes of many of the states, and then recommended the adoption of the amendment, saying that the act should be made 'as broad, as comprehensive and as inclusive in its terms as any of the similar remedial statutes existing in any of the states, which are suspended in their operation by force of the federal legislation upon the subject' (Senate Report No. 432, 61st Cong. [2nd Sess.], pp. 12-15; House Report No. 513, 61st Cong. [2d Sess.], pp. 3-6). While these reports cannot be taken as giving to the new sections a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted."

The action in the case last above mentioned was brought after the death of the injured employe, by an administrator, to recover damages both for injuries to and the death of his intestate. The plaintiff was awarded damages on both claims, and the judgment was affirmed by this Court, and from the opinion in that case we quote the following:

"No change (by the amendment) was made in section 1 (of the Act of 1908). * * * It continues, as

before, to provide for two distinct rights of action; one in the injured person for his personal loss and suffering, where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives, where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his personal representatives 'for the benefit of' the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. It does not mean that the injured person's right shall survive to his personal representative and yet be unenforceable by the latter, or that the survival shall be for the benefit of the designated relatives and yet be of no avail to them. On the contrary, it means that the right existing in the injured person at his death—a right covering his loss and suffering while he lived, but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative to the end that it may be enforced and the proceeds paid to the relatives indicated. And when this provision and section 1 are read together, the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful

act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

In the case of Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144, 147, this Court quoted with approval from the Craft case as follows:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

In the case of Kansas etc. R. Co. v. Leslie, 238 U. S. 599, this Court, referring to an instruction given by the trial court, said:

> "It is said that the court below erred in approving the charge permitting recovery for pecuniary loss to the widow and child, and also for conscious pain and

suffering by the deceased * * * between the injury and death. This charge was sustained in St. Louis etc. R. Co. v. Craft, 237 U. S. 648."

In the case of Northern Pac. Ry. Co. v. Maerkl, 198 Fed. 1, an injured railroad employe brought suit and afterwards died of his injuries, and his widow was appointed as administratrix of his estate and as such filed a supplemental complaint seeking a recovery for both personal injuries and death. The verdict allowed $936.80 for personal injuries and $8,640.00 for death damages. This judgment was affirmed. The Court in part said:

"We are of the opinion that the plain meaning of these statutory provisions is that when one receives an injury in the employment of a railroad company under such circumstances as entitles him or her, as the case may be, by virtue of the statute to recover from the company, damages therefor, and if such injury results in the death of the injured, damages resulting from the personal suffering and from such death, not only may be recovered by the personal representative of the deceased in one action, but must be recovered in one action only, if at all, for the benefit of those specified in the statute."

This case was later cited with approval by the Supreme Court of the United States.

In the case of Illinois C. R. Co. v. O'Neill, 100 C. C. A. 658, 177 Fed. 328, a writ of certiorari was denied by this Court, although an instruction authorized a recovery for

both personal injuries sustained by the deceased and also loss of support by the widow and children.

217 U. S. 604.

In the case of St. Louis etc. R. Co. v. Pearson, 170 Ark. 842, a recovery was approved for pecuniary loss to the widow and children and also for conscious suffering endured during life by the deceased employe, and it was announced that such recovery could be had in one suit under the Federal Employers' Liability Act and a writ of certiorari to that court was denied by this Court.

A similar construction of the amended Federal Employers' Liability Act, and like holding thereunder, have been made by the highest courts in many of the states, in accordance with the decision of this Court in the Craft case, among which we cite the following:

Birmingham etc. R. Co. v. Hendrix, ... Ala. ..., 110 So. 312;
St. Louis etc. R. Co. v. Conarty, 106 Ark. 421;
Baltimore etc. R. Co. v. Carroll, 200 Ind. ..., 163 N. E. 99;
Jorgensen v. Grand Rapids etc. R. Co., 189 Mich. 537, 543;
Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144;
Brooks v. Yazoo etc. R. Co., 111 Miss. 793;
Kilburn v. Chicago M. & St. P. R. Co., 289 Mo. 75;
Chicago R. I. & P. R. Co. v. Fontron, 89 Okla. 87;
Atchison etc. R. Co. v. Hix, ... Tex. Civ. App. ..., 291 S. W. 281;

Calhoun v. Great Northern R. Co., 162 Wis. 264;
Goodyear v. Davis, 114 Kans. 557, 39 A. L. R. 563;
Thornhill v. Davis, 121 S. C. 49, 24 A. L. R. 617.

These cases, we believe, make entirely clear the interpretation put upon the Federal Employers' Liability Act, after its amendment in 1910, and sustain the ruling of the trial court in this case.

In the light of these authorities construing and applying the amended Employers' Liability Act we submit that the death of Guerney O. Burtch did not give rise to a new and different cause of action than that stated in the pending suit, but merely presented a changed state of facts, material and proper for consideration in determining the amount of damages to be awarded, and that respondent's cause of action is not barred, and that the judgment herein should be in all things affirmed.

OSCAR H. MONTGOMERY,
T. HARLAN MONTGOMERY,
Attorneys for Respondent.

WILLIAM J. HUGHES,
Of Counsel.